

In the  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1978

No. 78-6809

DENNIS SEAY JENKINS,  
Petitioner,

v

CHARLES ANDERSON, Warden,  
Respondent.

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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## TABLE OF CONTENTS

Index of Authorities-----	ii
Opinions Below-----	1
Jurisdiction-----	1
Question Presented-----	1
Constitutional and Statutory Provisions Involved-----	1
Statement of the Case-----	2
Reasons for Denying the Writ	
This Case Does Not Involve Any Important Undecided Questions Of Federal Law Requiring Consideration By This Court Since The Court Of Appeals Was Clearly Correct In Holding That <u>Doyle v Ohio</u> , 426 US 610 (1976), Does Not Apply To Pre-Custody, Pre-Arrest Conduct-----	4
Conclusion-----	7

## INDEX OF AUTHORITIES

Chapman v California, 386 US 18 (1967)-----	6
Doyle v Ohio, 426 US 610 (1976)-----	4,5,6,7
Miranda v Arizona, 384 US 436 (1966)-----	4,5,6
Oregon v Mathiason, 429 US 492 (1977)-----	6

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OPINIONS BELOW

The Petition contains adequate reference to the order of the United States Court of Appeals for the Sixth Circuit, a copy of which is attached to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Were Petitioner's constitutional rights violated at his state court trial by the prosecutor's questions and comments concerning Petitioner's failure to report a stabbing incident for over two weeks?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition adequately sets forth relevant provisions.

STATEMENT OF THE CASE

Originally charged with first degree murder in connection with a stabbing death, Petitioner was convicted by a state court jury of manslaughter and received a sentence of 10 to 15 years imprisonment. There were several eye-witnesses to the stabbing and the prosecutor adduced evidence indicating that Petitioner Jenkins had been observed lurking outside a party store and that when the intended victim left the store Jenkins, without provocation, attacked him with a knife, stabbed him and fled. The motive for the stabbing was explained by other prosecution witnesses who testified that on the day before the stabbing the deceased and another man attempted to purchase narcotics from an individual who was part of the group which included Petitioner Jenkins. Their attempt to purchase the narcotics was unsuccessful because they did not have enough money and so the deceased and his companion robbed Petitioner Jenkins' companion of some money and narcotics. Defense witnesses, on the other hand, testified that there was a confrontation outside the party store and that a scuffle ensued during which the deceased was stabbed. Petitioner Jenkins testified that the stabbing was done in self-defense.

After fleeing the scene of the stabbing, Petitioner remained at large for 16 days, at which time he turned himself in to the Honorable Coleman Young, Mayor of the City of Detroit and was taken into custody.

Upon cross-examination of Petitioner by the prosecutor, the following colloquy occurred:

"Q And I suppose you waited for the Police to tell them what happened?

"A No, I didn't.

"Q You didn't?

"A No.

\* \* \* \*

"Q (Interposing) When was the first time that you reported the things that you have told us in Court today to anybody?

"A Two days after it happened.

"Q And who did you report it to?

"A To my probation officer.

"Q Well, apart from him?

"A No one.

"Q Who?

"A No one but my --

"Q (Interposing) Did you ever go to a Police Officer or to anyone else?

"A No, I didn't.

"Q As a matter of fact, it was two weeks later, wasn't it?

"A Yes."

Upon redirect examination of Petitioner Jenkins defense counsel engaged in the following exchange:

"Q How did your arrest come about, Dennis?

"A Me and my mother and my uncle, we talked to Coleman Young the night before the 27th, and I went down and turned myself in. Me and him and his bodyguard came over to Recorder's Court and went in front of Judge Crockett."

Upon recross-examination by the prosecutor the following exchange occurred, Tr 303:

"Q Was there any special reason why you went over to the Mayor's Bodyguard and to the Mayor and everything else to surrender yourself instead of going to the Police the same day when this happened, instead of waiting two weeks to go to the Mayor?

"A Yes, it is.

"Q What is the reason?

"A Because I was afraid. Judge Gardner just had gave me probation.

"Q You were afraid of whom?

"A I was afraid what I had happened."

In his closing argument the Prosecutor made a brief reference to this two-week delay in reporting the incident,

Tr 311-312; App 36a-37a:

"Now he waited two weeks, according to the testimony -- at least two weeks before he did anything about surrendering himself or reporting it to anybody. And then, after two weeks, he pulled the grand stand stunt of surrendering himself to the Mayor, because he claimed he was afraid. Of course he wasn't afraid during the two weeks, but after two weeks, he decided he was going to be afraid and he was going to surrender himself to the Mayor. I don't know what he really was afraid about. But he didn't make that very clear. He was afraid because of something that he had done. And, it might be something that might militate against his own interest. I would suggest to you that he waited two weeks before he surrendered himself because he did it after he had lined up all those Witnesses."

Petitioner asserts that these questions and comments by the Prosecutor constitute a violation of his constitutional rights under the rationale of Doyle v Ohio, supra, 426 US 610, but Respondent submits that this contention is without merit.

#### REASONS FOR DENYING THE WRIT

THIS CASE DOES NOT INVOLVE ANY IMPORTANT UNDECIDED QUESTIONS OF FEDERAL LAW REQUIRING CONSIDERATION BY THIS COURT SINCE THE COURT OF APPEALS WAS CLEARLY CORRECT IN HOLDING THAT DOYLE v OHIO, 426 US 610 (1976), DOES NOT APPLY TO PRE-CUSTODY, PRE-ARREST CONDUCT.

In Doyle v Ohio, 426 US 610 (1976) this Court held that the use for impeachment purposes of a defendant's silence at the time of arrest and after receiving Miranda warnings violated the Due Process Clause of the Fourteenth Amendment. Miranda v Arizona, 384 US 436 (1966) requires that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Since silence after such warnings may be nothing more than an



arrestee's exercise of the Miranda rights, "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." Doyle v Ohio, supra, 426 US at 617. Because of that insoluble ambiguity this Court held that a state prosecutor may not seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told him the story after receiving Miranda warnings at the time of his arrest.

The determinative difference between this case and Doyle is immediately apparent. In Doyle this Court referred exclusively to a defendant's silence after receiving Miranda warnings at the time of his arrest whereas in the instant case the challenged questions and comments refer to behavior occurring after the stabbing but prior to Petitioner Jenkins' arrest. Silence after an arrest may well be due to an arrestee's exercise of Miranda rights but such silence is fundamentally different than the failure to report the occurrence of a stabbing incident, a situation to which Miranda is simply inapposite. The opinion in Miranda v Arizona, supra, 384 US at 477-478 indicates that it is inapplicable in the instant circumstances:

"The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

"Our decision is not intended to hamper the traditional function of police officers in investigating crime. \* \* \* General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the factfinding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such

situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." (footnotes and citation omitted, emphasis added).

The requirement that a custodial situation exist before Miranda rights attach was re-emphasized in Oregon v Mathiason, 429 US 492 (1977) where this Court concluded that a confession need not be suppressed where it was given by an individual who was not deprived of his freedom of action in any significant way even though the confession was given during an interview with police officers at State Police offices and the individual had been told that although he was not under arrest he was suspected of involvement in a burglary.

The Doyle decision effectuates the prophylactic rules enunciated in Miranda and so it logically follows that since Miranda does not apply to questions about Petitioner Jenkins' pre-arrest silence, Doyle too is inapplicable. By its terms Doyle applies only to questioning about post-arrest silence, 426 US at 617, and so it is apparent that the Sixth Circuit's rejection of Jenkins' allegation was clearly correct.

The cases cited by Petitioner on page 6 of the Petition do not support his contention that Doyle prohibits questioning a defendant about pre-arrest silence since in each of those cases the defendant was in custody or was otherwise deprived of his freedom of action at the time of the silence about which he was subsequently questioned.

In the instant case Respondent submits that even if the prosecutor's actions are deemed to be a violation of Doyle v Ohio, supra, they are harmless beyond a reasonable doubt, see Chapman v California, 386 US 18 (1967), because of other overwhelming evidence of Petitioner's guilt. Petitioner was charged with first degree murder but was convicted by the jury of manslaughter, the elements of which were defined for the jury by the trial court. In arriving at its verdict the jury apparently rejected the claim of self-defense which was also defined for the jury.

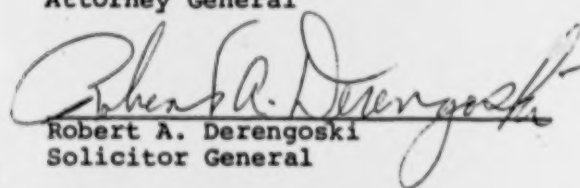
Although some defense witnesses claimed to have seen a struggle between the deceased and Petitioner Jenkins, other prosecution witnesses testified that the Defendant saw the deceased inside the store, waited outside for him to leave and then suddenly, without provocation or warning, stabbed him from behind. Petitioner admitted the stabbing but claimed self-defense. By its manslaughter verdict the jury indicated either that it did not believe the testimony regarding a struggle or that it believed Petitioner could have retreated and thus avoided the conflict but did not. By its manslaughter verdict the jury rejected the prosecution's theory that the murder was committed with malice aforethought and premeditation. The prosecution's questioning and comments which are here challenged under the Doyle principle relate merely to the timing of Petitioner's arrest and have no bearing on the truth or falsity of his self-defense story and therefore could not have influenced the jury's verdict.

#### CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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